Supreme Court, U.S.
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CASE NO. 85-1084

In The Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF INDEPENDENCE, ET AL.,
Petitioners,

v.

WARREN W. TYLER,
DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT WARREN W. TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, IN OPPOSITION

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15 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, MUST REFRAIN FROM CONDUCTING A REVIEW PURSUANT TO STATE LAW OF DETAIL PLANS FOR A SANITARY LANDFILL ON LAND WHICH, IT IS ARGUED, IS WITHIN THE BOUNDARIES OF A UNIT OF THE NATIONAL PARK SYSTEM, AND WHERE SUCH STATE ACTION IS SPECIFICALLY PERMISSIVE IN CHARACTER AND EXPRESSLY SUBORDINATE TO APPLICABLE FEDERAL LAWS, RULES AND REGULATIONS?

PARTIES

Petitioners:

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.

Respondents:

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	3
I. THE STATE PERMIT IS NOT CONTRARY TO OR IN CONFLICT WITH FEDERAL LAW	4
II. THE SITE MAY NOT BE SUBJECT TO ANY FEDERAL LAND USE LAW	6
III. FEDERALLY-CREATED RIGHTS AND REMEDIES ARE UNAFFECTED BY THE DIRECTOR'S ACTION	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases:

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 4, 5

Constitutional Provisions:

U.S. CONST. art. VI, cl. 2 3

Statutory Provisions:

16 U.S.C. Sec. 1c(a) 6
16 U.S.C. Sec. 460ff-1(a) 4, 5, 6, 7
16 U.S.C. Sec. 460L-22(c) 3, 5, 6

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BRIEF FOR RESPONDENT WARREN W. TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION, STATE OF OHIO, IN OPPOSITION

Warren W. Tyler, Director of Environmental Protection, State of Ohio, respectfully requests that this Court deny the petition for a writ of certiorari, filed by the City of Independence and others, seeking to review the judgment of the Court of Appeals, Tenth Appellate District, for Franklin County, Ohio.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Constitutional Provision:

The Supremacy Clause to the Constitution of the United States, art. VI, cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

This case raises the question of whether the United States of America has prohibited the Director of Environmental Protection, State of Ohio, from reviewing detail plans for a sanitary landfill as required by state law where such a landfill is sited on land which, it is argued, is within the boundaries of a unit of the National Park System, and where such state action is specifically permissive in character, and expressly subordinate to applicable federal laws, rules and regulations.

A. Procedural History.

On Feburary 1, 1982, the Director of Environmental Protection, State of Ohio ("Director"), issued to Mr. Pete Boyas, d/b/a Independence Development Sanitary Landfill, Boyas Excavating, Inc., ("Boyas") a permit to install ("Permit") a sanitary landfill at a shale mining site in the City of Independence, Cuyahoga County, Ohio. The permit expressly provided that the approval granted therein was subject to the requirements of applicable federal laws. The City of Independence and John J. Nicastro on behalf of the Save Our Independence Land Committee, and John J. Nicastro on behalf of the Independence Homeowners-Citizens Association, Inc., (collectively "City") appealed the Director's action to the Environmental Board of Review, State of Ohio ("Board"). On April 1, 1983, the Board issued a decision and order substantially upholding the Director's action, and concluded that the Director was not required to consider the land use interests of the United States of America in issuing the permit.

The City appealed the Board's decision to the Court of Appeals, Tenth Appellate District, Franklin County, Ohio ("Court of Appeals") which substantially affirmed the Board's decision and order and determined that neither the Director nor Board was required to prohibit the landfill under the United States of America park land use laws, to the extent such may apply

The Supreme Court of Ohio declined to consider the merits of the City's appeal.

B. Relevant Facts.

The Permit site is a shale quarry, seventeen acres in area and two hundred twenty feet deep. It was omitted from the original legislation designating the boundaries of the Cuyahoga Valley National Recreation Area ("CVNRA"), although it was included in a 1978 modification to the law. The actions of the Director and Board preceded passage of Public Law 98-506, codified at 16 U.S.C. Section 460L-22(c). Public Law 98-506 prohibits the operation of commercial landfills in National Park System units in some particular settings.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

There is no conflict between the Director's permissive act and the federal land use laws cited by the City, even if such laws are applicable. The Director's act merely authorizes landfill construction in the context of Ohio's environmental laws. The Permit does not excuse Boyas' compliance with federal land use laws. The lower forums consistently and correctly concluded that the Director's permissive act was not contrary to prohibitory federal law of dubious applicability. Because the City has not and cannot demonstrate a direct conflict between state administrative action and federal land use law, no genuine issue concerning the Supremacy Clause to the Constitution of the United States Art. VI, cl.2, exists. Therefore the City's petition must be denied.

I. THE STATE PERMIT IS NOT CONTRARY TO OR IN CONFLICT WITH FEDERAL LAW.

The Director administers state environmental laws, and in harmony therewith reviewed the technical and scientific aspects of Boyas' application. In issuing the Permit, the Director stated:

> Issuance of this permit approval (permit to install) does not constitute expressed [sic] or implied approval or agreement that, if constructed and/or modified in accordance with plans, specifications and/or information accompanying the permit application, the above described source of environmental pollutants will operate in compliance with applicable State and Federal laws and rules and regulations, ...(Appendix to City's petition, A62-63.)

Of the federal statutes in effect at the time of the Director's action, the only one cited by the City in its petition was the law creating the CVNRA, Public Law 93-555, Section 1, codified at 16 U.S.C. Section 460ff-1(a) et. seq. The general intent of Congress expressed therein was "preserving and protecting for public use and enjoyment, the historic, scenic, natural and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for the purpose of providing for the maintenance of needed recreational open space necessary to the urban environment. . ." 16 U.S.C. Section 460ff-1(a)

It is well-settled that the intent of the United States Congress to pre-empt state activity is one which can arise only where specific Congressional intent can be adduced. This Court in 1981 rejected an argument that the State of Montana was pre-empted through the Supremacy Clause from levying a severance tax on coal mined in Montana (including coal mined on federally owned land) and in *Commonwealth Edision Co. v. Montana,* 453 U.S. 609 (1981), declared:

> We do not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal. In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.,* at 133, 98 S. Ct., at 2217. The Court acknowledged the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.,* at 133-134, 98 S. Ct., at 2217-18. *Cf. New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 439 U.S. 96, 110-111, 99 S. Ct. 403, 412-413, 58 L. Ed. 2d 361 (1978). As we have frequently indicated, "(p)re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *** In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. *Commonwealth Edison Co. v. Montana,* 453 U.S. at 633-34.

Public Law 93-555, codified at 16 U.S.C. Section 460ff-1(a) et. seq., is by no stretch of the imagination an expression of clear congressional intent to bar the State of Ohio from making its environmental assessment of a proposed lanfill.

Public Law 98-506, Section 2, codified at 16 U.S.C. Section 460L-22(c), was enacted more than two years after the Director's action. Its inapplicability through timing is apparent.

However, even if it did apply, Public Law 98-506 speaks to operation of a landfill site, and does not expressly prohibit state review of scientific environmental considerations for constructing a site.

II. SITE MAY NOT BE SUBJECT TO ANY FEDERAL LAND USE LAW.

This particular Permit site has the peculiar distinction of being specifically subject to the administration of the Secretary of the Interior ("Secretary") "when acquired". At Public Law 93-555, codified at 16 U.S.C. Section 460ff-1(a) the Congress stated:

> After advising the Committees on Interior and Insular Affairs of the United States Congress, in writing, the Secretary may make minor revisions of the boundaries of the recreation area when necessary by publication of a revised drawing or other boundary description in the Federal Register. *Provided,* that with respect to the property known as the Hydraulic Brick Company located in Independence, Ohio, the Secretary shall have the first right of refusal to purchase such property for a purchase price not exceeding the fair market value of such property on the date it is offered for sale. *When acquired* such property shall be administered as part of the recreation area, subject to the laws and regulations applicable thereto. (Emphasis added.)

16 U.S.C. Section 1c(a) defines a unit of the National Park System as land and water administered by the Secretary through the National Park Service. Because 16 U.S.C.A. Section 460ff-1(a) makes the Secretary's administrative duties contingent upon this particular site's acquisition, it is quite doubtful that the site has achieved the status of a National Park System unit such as would subject it to the operation of 16 U.S.C. Section 460L-22(c).

It is thus apparent that the regulatory status of the Permit site in the context of federal land use laws is uncertain. Facing the conflicting assertions of Boyas and the City on this issue, the Director refused to base his determination of the permit application's merits on federal land use laws. He prudently analyzed the matter on the basis of the technical merits, and left the determination of the applicability of the federal land use prohibitions to the appropriate federal forum.

III. FEDERALLY-CREATED RIGHTS AND REMEDIES ARE UNAFFECTED BY THE DIRECTOR'S ACTION

It cannot be said that the Director's action is contrary to federal land use law or federal legislative goals. If the federal laws themselves are sound and in fact apply to site usage, an injunctive remedy in federal district court is available to prohibit the landfill.

The Director is required by state law to explore and resolve the technical environmental questions raised by Boyas' permit application. In the natural exercise of his authority, the Director declined to consider the applicability of Public Law 93-555, and the interests of the Secretary in administering lands within the National Park System. The Director correctly confined his analysis to the area of his expertise.

The Director perceived no conflict between issuance of the Permit and potential federal land use prohibitions, a perception consistently shared at all levels of appeal. As the Court of Appeals noted:

> "The question of the applicability of a federal statute to the use of land within a federal park system and the question of the cession of authority from Ohio over lands not acquired by the federal government should be resolved in a proceeding initiated by the appropriate federal agency". Appendix to City's petition at A11.

The interests of the Director in executing his duties to protect the environment, and the interests of the Secretary in protecting land use in National Park System units, are harmonious in this case. Each official acts to perform such duties in the context of his expertise.

It must be noted that the Secretary did not intervene in the state proceedings, nor has he initiated action in federal district court.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition for a writ of certiorari to the Court of Appeals, Tenth Appellate District, Franklin County, Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by depositing same in a United States post office, with first class postage prepaid, this _____ day of February, 1986, to each of the following:

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